No. 87-6177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHNNY PAUL PENRY,

Petitioner

-vs.-

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Texas Criminal Defense Lawyers Association is a non-profit membership organization made up of over 1,200 licensed attorneys throughout the State of Texas who are concerned about the criminal justice system and the citizens who come before the courts of our state.

There are presently over 270 men and women on death row in Texas, and this number is steadily increasing. Many of these persons are represented by members of the Texas Criminal Defense Lawyers Association. Although the question presented in this case concerns the constitutionality of article 37.071(b) as it applies to

Johnny Paul Penry, resolution of the issue will potentially affect many of the persons presently on death row in Texas.

This brief is filed in support of petitioner, Johnny Paul Penry. It addresses only the first question presented in Mr. Penry's Petition for Writ of Certiorari. Because of the Association's experience and familiarity with litigation involving article 37.071, we believe that we can be of assistance to the Court in this case. Consent has been granted by both parties to the filing of this *amicus curiae* brief, and is on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Eighth Amendment mandates that a capital sentencing jury be permitted to fully consider and act upon relevant mitigating evidence. Mr. Penry presented two types of evidence which have been previously recognized by this Court as relevant and mitigating. First, he suffered from a lifelong, incurable, organic brain disorder that rendered him mentally retarded and unable to control his impulsive behavior. Second, he had a miserable childhood, received no formal education, spent time in several mental institutions and suffered mental and physical abuse at the hands of his parents.

Despite Mr. Penry's efforts to have the jury instructed that it could consider and give effect to both types of mitigating evidence, the jury was instructed that its sentencing deliberations were limited to the determination of the three statutory special issues.

Accordingly, the jury was precluded from fully considering or giving effect to both types of mitigating evidence. As such, the jury was precluded from expressing a "reasoned moral response" to that evidence in violation of the Eighth Amendment.

ARGUMENT

THE JURY INSTRUCTIONS GIVEN LIMITED THE ABILITY OF THE JURY TO FULLY CONSIDER AND GIVE EFFECT TO THE RELEVANT MITIGATING EVIDENCE OF MR. PENRY'S MENTAL IMPAIRMENT AND TROUBLED CHILDHOOD, IN VIOLATION OF THE EIGHTH AMENDMENT.

A. The Evidence Was Applied By The Jury Only To Reach Affirmative Answers To The Special Issues

The jury convicted Johnny Paul Penry of killing and raping Pamela Carpenter. [R.I—111] The punishment phase of the trial was then had, at which time both the state and the defense offered additional evidence.

At the conclusion of the punishment phase, the jury was instructed to answer the three special issue questions enumerated in article 37.071(b) of the Texas Code of Criminal Procedure to determine whether Mr. Penry should live or die. These questions, which were to be answered simply "yes" or "no," asked the jury to determine whether Mr. Penry had deliberately killed Ms. Carpenter, whether he would probably commit acts of violence in the future, and whether the homicide was unreasonable in response to provocation by Ms. Carpenter. [R.I—118] The jury was told only to answer the questions and was not given any other way to speak to Mr. Penry's sentence. Under Texas law, if the questions are all answered affirmatively, the death sentence is mandatory. Tex. Code Crim. Proc. Ann. art. 37.071(e) (Vernon Supp. 1988).

The jury returned affirmative answers to all three questions after deliberating for only 46 minutes. [R.XVII—2697-2699] In light of the evidence presented and the narrow scope of the three questions, neither the answers themselves, nor the speed at which they were returned, is surprising. The Texas Court of Criminal Appeals characterized the special issue evidence as "overwhelming," and it was, absent an instruction to the jury authorizing the jury to consider and to give effect to the mitigating evidence. *Penry v. State*, 691 S.W. 636, 652-53 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 834 (1986).

B. In Addition To The Evidence Which Supported Affirmative Answers To The Special Issues, There Was Substantial Mitigating Evidence

Mitigating evidence is evidence relevant to the defendant's character, record, or the circumstances of the offense, which might serve as a basis for a sentence less than death. *See Skipper v. South*

Carolina, 106 S.Ct. 1669, 1671 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). A review of the record in Mr. Penry's case demonstrates that, in addition to the evidence which supported affirmative answers to the narrow special issues, there was also a substantial amount of relevant mitigating evidence before his sentencing jury. This evidence falls into two categories.

First, there was evidence that Mr. Penry was mentally impaired. Doctor Jose G. Garcia was a psychiatrist with extensive experience in examining and treating criminal offenders. Based on personal examination of Mr. Penry, and a study of his medical records dating back to 1965, he concluded that Mr. Penry was suffering from an organic brain disorder. The defect was probably acquired at birth, but could also have resulted from repeated physical abuse at an early age. [R.XVI—2161-62, 2135] Because of this organic impairment, Mr. Penry has no impulse control. No matter how hard he tries to behave properly, he cannot, and, because the damage is permanent, he will never improve or be cured. Unlike healthy people, Mr. Penry does not learn from experience. [R.XVI—2130-31] Over the years, Mr. Penry has been variously classified as mildly, moderately, and severely retarded. [R.XVI—2144-2149] Doctor Garcia described the practical effect of Mr. Penry's mental impairment:

> We're talking about someone who could not function independently ever. And I mean literally and absolutely ever. There is just no way a person that has this type of intellectual functioning is going to be self-supporting, self-sufficient, self-caring at any time.

[R. XVI—2153][1]

In *California v. Brown*, 107 S.Ct. 837 (1987), Justice O'Connor recognized "the belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than

[1] The state called two psychiatric experts. Doctor Felix Peebles, Jr. agreed that Mr. Penry was suffering from moderate to mild mental retardation. [R.XVI—2377-79] Doctor Kenneth Vogtsberger agreed that Mr. Penry was unable to control his impulses, but found him only to be of below average intelligence, rather than retarded. [R.XVI—2334-35, 2342]

defendants who have no such excuse." *Id.* at 841 (O'Connor, J., concurring). *See also California v. Ramos*, 463 U.S. 992, 995 (1983) (mild congenital brain damage, low IQ borderline schizophrenia); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (diminished mental and emotional development). The sort of mental problem that Mr. Penry suffers from—a lifelong, incurable, organic brain disorder, which rendered him mentally retarded and unable to control his impulsive behavior—is just the sort of mental problem which might render a defendant less culpable than one without such an excuse. It is a valid mitigating circumstance in that it is relevant to an aspect of Mr. Penry's character which would tend to serve as a basis for a sentence less than death.

The second category of relevant mitigating evidence before this jury concerned Mr. Penry's troubled childhood. "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *see also Burger v. Kemp*, 107 S.Ct. 3114, 3123, 3123 n.7 (1987) (evidence of "exceptionally unhappy and unstable childhood" is undoubtedly relevant mitigating evidence); *Hitchcock v. Dugger*, 107 S.Ct. 1821, 1824 (1987) (defendant as a child had abused drugs and came from a poor family).

The evidence that Mr. Penry had a troubled childhood was uncontroverted. Doctor Peebles, the state's expert, testified that Mr. Penry "had a very bad life generally, bringing up. He had been socially and emotionally deprived and he had not learned to read and write adequately." [R.XVI—2380] Medical records introduced at trial proved that from the age of 10 years old, Mr. Penry had been in and out of various mental institutions and schools, including the Austin State Hospital, the Rusk State Hospital, the Austin State School, the Mexia State School, and the Child and Adolescent Psychiatric Unit of the University of Texas Medical Branch at Galveston. [R.XVI—2122-26] His mother, who herself had a history of mental problems, testified that he had been abused by his father, that he had been regularly locked inside his bedroom at night, and that he had never successfully completed a single grade level in school. [R.XVI—2237, 2243-44, 2262] His sister testified that their mother had beaten Mr. Penry with a belt until he was physically scarred, and

that he had been locked up in his bedroom without access to a bathroom. [R.XVI—2277-79] His aunt testified that he had required constant care as a child, and that, when he was 14, she spent a full year just teaching him to write his name. [R.XVI—2308, 2314]

C. Although The Jury Had Relevant Mitigating Circumstances Before It, There Was No Way For The Jury To Consider And Act Upon This Evidence To Impose A Life Sentence

In *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), this Court held unconstitutional a death penalty scheme which permitted *no* consideration of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." The Court, however, made no attempt at determining just what facets of an offender or an offense are relevant, and what degree of consideration is required, until *Lockett v. Ohio*, 438 U.S. 586 (1978). There the Court concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis in original).

At issue in *Lockett* was a statute which limited the capital sentencer to consideration of three statutory mitigating circumstances. In evaluating the constitutionality of this statute, the *Lockett* Court analyzed Sandra Lockett's particular mitigating circumstances. She was young, she had played only a minor role in the offense, and there was no direct proof that she had intended to cause the death of the victim. Despite the fact that these circumstances were all relevant facets of the offender and her offense, under the Ohio death penalty scheme, they were not "permitted, as such, to affect the sentencing decision." Instead of being given independent mitigating weight, as required by the Constitution, these circumstances were "relevant for mitigating purposes only if it is determined that [they] shed[] some light on one of the three statutory mitigating factors." *Id.* at 608.

> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

Id.

Ms. Lockett's problem was that even though she presented several relevant mitigating circumstances which ought to have been considered by her sentencer, these circumstances were not considered because she failed to prove her entitlement to a life sentence under the three limited statutory issues. As a result she was condemned to death.

A similar situation arose in *Mills v. Maryland*, 108 S.Ct. 1860 (1988). In *Mills*, this Court considered the application of the Maryland statute to a defendant sentenced to death. The Court stated:

> Under Maryland's sentencing scheme, if the sentencer finds that any mitigating circumstance or circumstances have been proved to exist, it then proceeds to decide whether those mitigating circumstances outweigh the aggravating circumstances and sentences the defendant accordingly . . . But if the petitioner is correct, a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death . . . Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute . . . ; by the sentencing court . . . ; or by an evidentiary ruling . . . The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, if petitioner's interpretation of the sentencing process is correct, the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Id.* at 1865-1866 (citations omitted).

As we will demonstrate, this is the identical problem faced by Mr. Penry in his case. Although he offered substantial and credible evidence of his mental impairment and troubled childhood, and although these are unquestionably relevant mitigating circumstances according to this Court, his sentencing jury was limited to the narrow special issues and was therefore unable to consider and give effect to these relevant mitigating circumstances as required by the Eighth and Fourteenth Amendments to the United States Constitution.

D. The Jury Was Told From The Beginning That Its Punishment Considerations Were Limited To The Three Special Issue Questions

From the moment the prospective jurors walked into the courtroom, they were told that their sentencing deliberations would be limited to three questions. The court instructed the venire that "the punishment *is determined* by the jury's answer to the three questions . . . ."[R.VIII—6, 9][emphasis supplied] The state also was careful to tell the venirepersons that their sentencing considerations were restricted to the three special issues. Typical is the examination of Chris T. Burkholder, who became the foreperson of the jury. After Mr. Burkholder agreed that he could return a guilty verdict if convinced beyond a reasonable doubt, the following occurred:

> Q And if the State went further and in the punishment and proved to your satisfaction that the answer to each of these questions beyond a reasonable doubt should be yes, could you return a verdict of yes on each of these questions, even though you knew that the Judge would automatically give the man the death penalty?
>
> A Yes, sir. I could.

[R.X—877]

In accordance with these instructions, the court's charge on punishment was limited to the three special issues. The word "mitigation" is not mentioned in the charge. [R.I—117-119] The

trial court overruled all of Mr. Penry's objections to the charge, including that it failed to expressly require the jury to consider the mitigating circumstances. [R.XVII—2661-2662]

Finally, this effort to limit the jury's consideration was again repeated by the state during its summation. Mr. Keeshan stated, "I'm going to turn now pretty quickly to the three special issues you're concerned about in this case." [R.XVII—2667] And then he did so, spending the balance of his argument explaining why the answers to the questions should be "yes."[R.XVII—2668-2673] Mr. Price chided defense counsel for straying from the narrow issues in their argument:

> I did not recall any of them discussing any fact issues, any evidence, and that's what you are about to do, go out and follow the instructions that the Court has given you. You all told us under oath on voir dire what your feelings were on the death penalty. I'm not going to argue the issue whether the death penalty is right or wrong. We've already discussed that individually, each one of us. You've all taken an oath to follow the law and you know what the law is. I'm not going to discuss that with you. You've all said you want to follow the law, and I trust that you will, and I know that you will. I didn't hear Mr. Newman or Mr. Wright say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all I asked you to do, is to go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason that you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the State's case because, ladies and gentlemen, I submit to you we've met our burden. So, what we have here is about forty-five minutes of emotional argument, and that's what exactly it all boils down to, pleading to your emotions. And obviously, this is the type of subject that can be used to easily move you emotionally. It would move

> anyone, and I think there would be something wrong with you, if you weren't at least concerned. But ladies and gentlemen, your job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the Judge has given it to you, and on the evidence that you have heard in this courtroom, then answer those questions accordingly.

[R.XVII—2689-90]

Considering the narrowness of the special issues and the refusal of the trial court to explicitly instruct the jury to consider Mr. Penry's particularized mitigating circumstances, counsel had no legitimate framework upon which to base an argument. Indeed, counsel had no mechanism to ask the jury to consider Mr. Penry's mental disorder and his troubled childhood in the context of its analysis of the answers to the special issues. This is why Mr. Penry is before this Court.

E. Because Of The Nature Of Mr. Penry's Mitigating Evidence, There Is No Basis For Speculating That The Jury Considered It In Answering The Special Issues

The state will argue that, despite the fact that the jury was not explicitly instructed to consider mitigating circumstances, and despite the fact that the jury was repeatedly told that its considerations were limited to the three special issues, it is reasonable to believe that the jury considered Mr. Penry's retardation and childhood anyway in answering the questions. This is wrong for at least two reasons.

First, it is wholly speculative whether the jury considered these mitigating circumstances under the instructions it was given. Because the penalty of death is qualitatively different from all others, there is a heightened need for reliability in capital sentencing procedures. *E.g., Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985); *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As Justice O'Connor has noted, a capital sentencing determination should not leave it to speculation

> whether the trial judge and the Court of Criminal Appeals actually considered all of the migtigating factors and found them to be insufficient to offset the aggravating circumstances . . . .
>
> *Woodson* and *Lockett* require us to remove any ligitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring). Because Mr. Penry's jury was not instructed to consider his mitigating circumstances, it is at best ambiguous whether they were considered.

Second, apart from rank speculation, there is no logical reason to believe that Mr. Penry's jury viewed his mental impairment and troubled childhood as mitigating under the instructions given. In considering the propriety of a jury instruction, this Court asks how "a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979). In this case, no reasonable juror could have interpreted the narrow special issues to permit the consideration of either Mr. Penry's mental impairment or his troubled childhood, "*as a mitigating factor.*" *Lockett v. Ohio*, 438 U.S. at 604.

At first blush, special issue number one, which asks whether the defendant acted deliberately, may seem to comprehend mental impairment. "Deliberately" was not defined in the present case, as is customary in Texas. As a result, it is unknown what definition the jury gave the term. A rational juror might well have concluded that Mr. Penry intentionally and deliberately killed Ms. Carpenter. This same juror might well have thought that, because of this mental problem, Mr. Penry was "less culpable than defendants who have no such excuse." *California v. Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring). Under the narrow Texas special issue system, though, this juror, having found that Mr. Penry acted deliberately, would be unable to honestly give effect to his mitigating evidence.

Although his mental impairment was certainly relevant to special issue number two—future dangerousness—absent the requested instructions, no juror could have regarded that evidence

as a mitigating factor, as required by *Lockett*. Indeed, there is no reason to suggest that Mr. Penry's mental condition was considered by the jury or given any effect by the jury in regard to this special issue given the absence of the requested jury instructions.

As to special issue number three—provocation—Mr. Penry's mental disability could be viewed as mitigating evidence for answering it in the negative, but only if an instruction along the lines of the requested instruction had been given.

Much of the same can be said regarding the other category of mitigating evidence: his troubled childhood. The mitigating circumstances of Mr. Pentry's background and childhood problems could not have had any effect on the jury's consideration of any of the special issues because the trial court failed to instruct the jury that they could give the mitigating circumstances any weight of any kind. Thus, absent an instruction to the jury as requested by Mr. Penry, a juror would have to answer the special issues "yes" even though he believed that Mr. Penry, because of the childhood abuse, was less morally culpable than someone who had not been abused.

F. Mr. Penry's Death Sentence Is Contrary To *Lockett* and Subsequent Cases From This Court

As shown above, the *Lockett* error in this case is that the jury was precluded from considering and acting upon the relevant mitigating circumstances of Mr. Penry's mental disability and troubled childhood because its sentencing deliberations were restricted to the three statutory special issues. As in *Lockett*, "[t]he limited range of mitigating circumstances which may be considered by the sentencer . . . is incompatible with the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. at 608.

Hitchock v. Dugger, 107 S. Ct. 1821 (1987) is also relevant. There, the advisory jury was given a list of statutory mitigating circumstances which it was allowed to consider. The sentencing judge later announced that he was "mandated to apply the facts to *certain enumerated* 'aggravating' and 'mitigating' circumstances." *Id.* at 1824 (emphasis in original). This Court reversed the death sentence, holding that "it could not be clearer that the

advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper* . . . *Eddings* . . . [and] *Lockett* . . . ." *Id.*

In a case like Mr. Penry's there is no perceptible difference between the Texas procedure, in which the jury is directed to answer "certain enumerated" statutory questions, and the procedure employed in *Hitchcock*. If there is a difference, it is only that the Texas system is even more restrictive, because in Florida the list of potentially mitigating circumstances is more comprehensive than are the Texas special issues. *See Hitchcock v. Dugger*, 107 S.Ct. at 1823 n.3.

Sumner v. Shuman, 107 S.Ct. 2716 (1987) articulates most graphically the constitutional fault in such a sentencing scheme. There the Court considered Nevada's capital procedure where death was mandatory upon a finding of two "indicators": conviction for murder while in prison under a statute which yielded a sentence of life imprisonment without parole. *Id.* at 2724. Finding that these two indicators "do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case," the death sentence was reversed.

> Not only do the two elements that are incorporated in the mandatory statute serve as incomplete indicators of the circumstances surrounding the murder and of the defendant's criminal record, but they say nothing of the "[c]ircumstances such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 2725. Although the Texas statue clearly permits the jury to consider more potentially mitigating evidence than did the Nevada statute, its special issues are also "incomplete indicators," which are silent on the circumstances of the offender such as youth, intoxication, or mental condition. Accordingly, the narrow Texas

statute provides a constitutionally inadequate basis to determine the appropriateness of the death sentence.

G. The Fifth Circuit Recognized The Constitutional Problem In This Case

The court below appreciated the strength of Mr. Penry's constitutional complaint:

> The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of violence that constitute a threat to society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory. The jury cannot say, based on mitigating circumstances that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cuse it to decline to impose the death penalty"? *McCleskey*, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring).

Penry v. Lynaugh, 832 F.2d at 924-25.

Although the court recognized the potential constitutional problem in *Penry*, it felt itself "bound by superior authority to reject his contention . . . " *Id.* at 916-917.

A majority of the Texas Court of Criminal Appeals has consistently rejected challenges to article 37.071 like the one Mr. Penry is now making. *E.g., Cordova v. State*, 733 S.W.2d 175, 190 (Tex. Crim. App. 1987); *Demouchette v. State*, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986); *Clark v. State*, 717 S.W.2d 910, 920-921 (Tex. Crim. App. 1986), *cert. denied*, 107 S.Ct. 2202 (1987); *Anderson v. State*, 701 S.W.2d 868, 873 (Tex. Crim. App. 1985), *cert. denied*, 107 S.Ct. 239 (1986); *Penry v. State*, 691 S.W.2d 636, 654 (Tex. Crim. App. 1985), *cert. denied*, 106 S.Ct. 834 (1986); *Stewart v. State*, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984), *cert. denied*, 106 S.Ct. 190 (1985); *Williams v. State*, 622 S.W. 2d 116, 121 (Tex. Crim. App. 1981), *cert. denied*, 455 U.S. 1008 (1982).

Three judges on the court, however, have taken issue with the conclusion that the narrow special issues are sufficient by themselves to guide the jury on mitigating evidence:

> If we are insure the constitutionality of 37.071, we must not only give lip service to broadly *interpreting* it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence. It is folly for the Court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know the holdings of *Lockett* and *Eddings* until the defendant affirmatively proves the contrary.

Stewart v. State, 686 S.W.2d at 125-26 (Clinton, J. joined by Teague and Miller, J.J., dissenting) (emphasis in original); *see also Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984) (Clinton, joined by Miller, J., concurring).

The specific concern of the minority was that certain evidence by its very nature "is at once damning and mitigating." *Stewart v. State*, 686 S.W.2d at 125. As examples, the dissenters listed the very circumstances found in Mr. Pentry's case--mental disease and childhood deprivation. Although such factors might be mitigating in that they may lead the jury to exercise mercy, at the same time they may estabish a probability of future dangerousness, thus compelling an affirmative answer to the second issue. According to these judges, the narrow Texas procedure does not permit the

jury to accord *independent weight* to all relevant mitigating circumstances, in violation of *Lockett v. Ohio*. *Id.* at 125-126. To insure that Texas procedure complies with *Lockett*, the dissenters would require an instruction on mitigating evidence. This is precisely Mr. Penry's contention.

H. *Jurek v. Texas* Need Not Be Overruled

As noted above, the Fifth Circuit clearly recognized the constitutional problem in this case. Beyond recognizing the problem, however, the court below was unwilling to grant Mr. Penry relief, feeling itself bound by superior authority. *Penry v. Lynaugh*, 832 F.2d at 916-17. The court indicated that the solution might require that *Jurek v. Texas* be reconsidered. Amicus respectfully disagrees that *Jurek* must be overruled in order to give Mr. Penry the relief he seeks.

In *Jurek*, this Court rejected a number of broad, *facial* challenges to the constitutionality of article 37.071. Among other things, the Court held that, based on the evidence then before it, it appeared that the Texas Court of Criminal Appeals was broadly interpreting the special issues to permit the consideration of particularized mitigating circumstances *Jurek v. Texas*, 428 U.S. 262, 272 (1976).

The Court in *Jurek* expressly relied on the Texas state court's interpretation of article 37.071 in holding that that statute provided the guidance required by the Constitution. As recognized two years later, in *Lockett v. Ohio*, 438 U.S. 586 (1978), article 37.071 survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Court of Criminal Appeals had broadly interpreted the second question--despite its facial narrowness--so as to permit the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show. *Id.* at 607.

Jurek was announced on July 2, 1976, the same date decisions were announced upholding the facial validity of the death penalty statutes of Georgia and Florida. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). In *Lockett*, 438 U.S. 586 (1978), the Court remarked that "[n]one of [these]

statutes *clearly operated at that time* to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." *Id.* at 607 (emphasis supplied).

Since 1976 this Court has re-examined both the Georgia and Florida statues in light of subsequent cosntruction by those states' courts. As a result, death sentences imposed upon prisoners in both states have been invalidated, notwithstanding the Court's earlier decisions in *Gregg* and *Proffitt*. *See Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

It is time for a similar "as applied" examination of article 37.071. Such examination would show that in certain cases, the statute does not preclude the consideration of relevant mitigating circumstances. *See e.g., Franklin v. Lyanaugh*, 108 S.Ct. 2320, 2332 (1988). In other cases, however, because of the nature of the particular evidence, the statute does operate to preclude the full consideration that the Constitution requires. Mr. Penry's case clearly falls into the latter category. His challenge, unlike Mr. Jurek's is not a facial one, but instead it complains of unconstitutional application in his case. *See* Petition for Writ of Certiorari, pp. 11, 13. Recognition that the Texas statute operated unconstitutionally against Mr. Penry will not mean that it operates unconstitutionally in all cases. Nor will such a decision require that *Jurek* be overruled, any more than *Godfrey* overruled *Gregg*, or *Hitchcock* overruled *Proffitt*.

I. *Franklin v. Lynaugh* is Limited To Its Facts

In *Franklin v. Lynaugh*, 108 S.Ct. 2320 (1988), petitioner raised a claim similar to the one now raised by Mr. Penry. A plurality of this Court rejected Mr. Franklin's claim, because it did not believe that the Texas special issue system "precluded jury consideration of any relevant mitigating circumstances *in this case*, or otherwise unconstitutionally limited the jury's discretion *here*." *Id.* at 2332 (emphasis supplied). As the emphasized language indicates, the *Franklin* holding was expressly limited to its facts. Mr. Franklin presented two mitigating circumstances--"residual doubt" about his guilt and his good behavior in prison. All nine Justices rejected "residual doubt" as a constitutionally mandated

mitigating circumstance. And, the plurality found that since Mr. Franklin's prison record was fully considered by the jury when answering the second special issue, no further jury instruction was required. *Id.* at 2329.

There are two important distinctions between the present case and *Franklin*. First, unlike "residual doubt," this Court has expressly recognized that the circumstances proved by Mr. Penry—mental disability and troubled childhood—are relevant mitigating circumstances. *See Burger v. Kemp*, 107 S.Ct. 3114, 3123, 3123 n.7 (1987) (unhappy childhood); *Hitchcock v. Dugger*, 107 S.Ct. 1821, 1824 (1987) (childhood); *California v. Ramos*, 463 U.S. 992, 995 (1983) (mental impairment); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (troubled childhood and mental impairment). Second unlike the single valid mitigating circumstance found in *Franklin*, Mr. Penry's two circumstances were not fully considered by the narrow special issues.

It is also important to examine the concurring opinion in *Franklin*. Justice O'Connor, joined by Justice Blackmun, expressed doubts that the Texas capital sentencing scheme could "constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense that mitigates against the death penalty." *Id.* at 2332. Justices O'Connor and Blackmun concurred in the judgement *only* because the prison-record evidence relied on by Mr. Franklin related solely to one of the special issue questions. But Justice O'Connor made this critical distinction:

> If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation.

Id. at 2333.

That is, of course, precisely the kind of evidence presented by Mr. Penry in this case: some of the mitigating evidence may have been relevant to the special issues, but all of the mitigating evidence certainly was relevant to Mr. Penry's moral culpability beyond the scope of the special issues. Nevertheless, the jury was effectivly precluded from considering all of the mitigating evidence and from giving effect to all of the mitigating evidence in determining whether Mr. Penry *would* live or die. Indeed, the jury was not allowed to say whether Mr. Penry's moral culpability was such that he *should* be allowed to live. Unlike *Franklin*, this case graphically illustrates that the constitutional doubts expressed by Justices O'Connor and Blackmun are well founded.

J. What Was The Jury To Do

The court below captured the problem in this case:

> What was the jury to do if it decided that Penry, because of retaruation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence. We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.

Penry v. Lynaugh, 832 F.2d at 925. The court was right. There was no way for the jury fully and favorably to act on the mitigating circumstances of Mr. Penry's mental impairment and troubled youth. This was constitutional error. As a result, his conviction must be reversed and the cause remanded for a new trial.

Conclusion

The judgment of the United States Court of Appeals affirming the denial of the petition for writ of habeas corpus should be reversed.

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